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Eightieth session
15 March - 2 April 2004

VIEWS

Communication No. 926/2000

Submitted by:	Hak—Chul Shin (represented by counsel, Mr. Yong-Whan Cho)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	25 April 2000 (initial submission)
Document references:	Special Rapporteur's rule 86/91 decision, transmitted to the State party on 8 May 2000 (not issued in document form)
Date of adoption of Views:	16 March 2004

On 16 March 2004, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 926/2000. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eightieth session

concerning

Communication No. 926/2000*

Submitted by:	Hak—Chul Shin (represented by counsel, Mr. Yong-Whan Cho)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	25 April 2000 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 16 March 2004,

Having concluded its consideration of communication No. 926/2000, submitted to the Human Rights Committee on behalf of Mr. Hak—Chul Shin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication, and the State party,

Adopts the following:

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Hak-Chul Shin, a national of the Republic of Korea born on 12 December 1943. He claims to be a victim of a violation by the Republic of Korea of article 19, paragraph 2, of the Covenant. He is represented by counsel.

1.2 On 8 May 2000, the Committee, acting through its Special Rapporteur on New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party not to destroy the painting for the production of which the author was convicted, whilst the case was under consideration by the Committee.

The facts as presented by the author

2.1 Between July 1986 and 10 August 1987, the author, a professional artist, painted a canvas-mounted picture sized 130cm by 160cm. The painting, entitled "Rice Planting (Monaeki)" was subsequently described by the Supreme Court in the following terms:

> "The painting as a whole portrays the Korean peninsula in that its upper right part sketches Baek-Doo-San, while its lower part portrays the southern sea with waves. It is divided into lower and upper parts each of which portrays a different scene. The lower part of the painting describes a rice-planting farmer ploughing a field using a bull which tramps down on E.T. [the movie character "Extraterrestial"], symbolizing foreign power such as the so-called American and Japanese imperialism, Rambo, imported tobacco, Coca Cola, Mad Hunter, Japanese samurai, Japanese singing and dancing girls, the then [United States'] President Ronald Reagan, the then [Japanese] Prime Minister Nakasone, the then President [of the Republic of Korea] Doo Hwan Chun who symbolizes a fascist military power, tanks and nuclear weapons which symbolize the U.S. armed forces, as well as men symbolizing the landed class and comprador capitalist class. The farmer, while ploughing a field, sweeps them out into the southern sea and brings up wire-entanglements of the 38th parallel. The upper part of the painting portrays a peach in a forest of leafy trees in the upper left part of which two pigeons roost affectionately. In the lower right part of the forest is drawn Bak-Doo-San, reputed to be the Sacred Mountain of Rebellion [located in the Democratic People's Republic of Korea (DPRK)], on the left lower part of which flowers are in full blossom and a straw-roofed house as well as lake is are portrayed. Right below the house are shown farmers setting up a feast in celebration of fully-ripened grains and a fruitful year and either sitting around a table or dancing, and children with an insect net leaping about."

The author states that as soon as the picture was completed, it was distributed in various forms and was widely publicized.

2.2 On 17 August 1989, the author was arrested on a warrant by the Security Command of the National Police Agency. The painting was seized and allegedly damaged by careless handling of the prosecutor's office. On 29 September 1989, he was indicted for alleged breach of article 7 of the National Security Law, in that the picture constituted an "enemy-benefiting expression".[1] On 12 November 1992, a single judge of the Seoul Criminal District

[1] Article 7 of the National Security Law provides, inter alia,

Court, at first instance, acquitted the author. On 16 November 1994, three justices of the 5th panel of the Seoul District Criminal Court dismissed the prosecutor's appeal against acquittal, considering article 7 of the National Security Law applicable only to acts which were "clearly dangerous enough to engender national existence/security or imperil the free democratic basic order". On 13 March 1998, however, the Supreme Court upheld the prosecutor's further appeal, holding that the lower court had erred in its finding that the picture was not an "enemy-benefiting expression", contrary to article 7 of the National Security Law. In the Court's view, that provision is breached "when the expression in question is actively and aggressively threatening the security and country or the free and democratic order". The case was then remitted for re-trial before three justices of the Seoul District Criminal Court.

2.3 During the re-trial, the author moved that the Court refer to the Constitutional Court the question of the constitutionality of the Supreme Court's allegedly broad construction of article 7 of the National Security Law in the light of the Constitutional Court's previous confirmation of the constitutionality of an allegedly narrower construction of this article. On 29 April 1999, the Constitutional Court dismissed a third party's constitutional application raising the identical issue on the basis that, having previously found the provision in question to be constitutional, it was within the remit of the Supreme Court to define the scope of the provision. As a result, the Seoul District Criminal Court dismissed the motion for a constitutional reference.

2.4 On 13 August 1999, the author was convicted and sentenced to probation, with the court ordering confiscation of the picture. On 26 November 1999, the Supreme Court dismissed the author's appeal against conviction, holding simply that "the lower court decision [convicting the author] was reasonable because it followed the previous ruling of the Supreme Court overturning the lower court's original decision". With the conclusion of proceedings against the author, the painting was thus ready for destruction following its earlier seizure.

The complaint

3.1 The author contends that his conviction and the damage caused to the picture by mishandling are in violation of his right to freedom of expression protected under article 19, paragraph 2, of the Covenant. At the outset, he contends that the painting depicts his dream of peaceful unification and democratisation of his country based on his experience of rural life during childhood. He argues that the prosecution's argument, in depicting the painting as the author's opposition to a corrupt militaristic south and the desirability of a structural change towards peaceful, traditionally-based farming north, and thus an incitement to "communisation" of the Republic of Korea, is beyond any logical understanding.

"Any person who has benefited the anti-State organization by way of praising, encouraging or siding with or through other means the activities of an anti-State organization, its member or a person who had been under instruction from such organization, shall be punished by imprisonment for not more than seven years. ...
Any person who has, for the purpose of committing the actions stipulated in paragraphs 1 through 4 of this article, produced, imported, duplicated, processed, transported, disseminated, sold or acquired documents, drawings or any other similar means of expression shall be punished by the same penalty as set forth in each paragraph." [author's translation]

3.2 The author further argues that the National Security Law, under which he was convicted, is directly aimed at restricting "people's voices". He recalls in this vein the Committee's Concluding Observations on the State party's initial and second periodic reports under article 40 of the Covenant,[2] its Views in individual communications under the Optional Protocol[3] as well as recommendations of the Special Rapporteur of the Commission on Human Rights on the right to freedom of opinion and expression.[4]

3.3 The author notes that, at trial, the prosecution produced an "expert witness", whose opinion was regarded as authoritative by the Supreme Court, in support of the charges. This expert contended that the picture followed the theory of "socialist realism". In his view, it depicted a "class struggle", led by farmers seeking to overthrow the Republic of Korea due to its relationship with the United States and Japan. The expert considered that the mountains shown in the picture represented the "revolution" led by the DPRK, and that the shape of houses depicted reflected those of the birthplace of former DPRK leader Kim Il Sung. Thus, in the expert's opinion, the author sought to incite overthrow of the regime of the Republic of Korea and its substitution with "happy lives" lived according to DPRK doctrine.

3.4 While the lower courts regarded the picture as, in the author's words, "nothing more than a description of the imagery situation in [his] aspirations for unification in line with his personal idea of Utopia", the Supreme Court adopted the expert's view, without explaining its rejection of the lower court's view and of their assessment of the expert evidence. On re-trial, the same expert again gave evidence, contending that even though the picture was not drawn in accordance with "socialist realism", it depicted happiness in the DPRK, which would please persons in the DPRK whenever they saw it, and that thus the picture fell within the purview of the National Security Law. Under cross-examination, it emerged that the expert was a former DPRK spy and former painting teacher without any further professional expertise in art, who was employed by the Institute for Strategic Research against Communism of the National Police Agency, whose task was to assist police investigation of national security cases.

3.5 According to the author, during the re-trial, his counsel pointed out that in 1994, during the author's original trial, a copy of the picture was displayed in the National Gallery of Modern Art in an exhibition entitled "15 Years of People's Art", an artistic style positively commented upon by the Gallery. Counsel also led in expert evidence an internationally known art critic, who rejected the prosecution expert's contentions. In addition, counsel, in arguing for a narrow interpretation of article 7 of the National Security Law, provided the court with the Committee's previous Views and Concluding Observations, as well as the Special Rapporteur's recommendations, all of which are critical of the National Security Law. Notwithstanding, the Court concluded that his conviction was "necessary" and justified under the National Security Law.

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[2] A/47/40,paras.470-528 (initial report), and CCPR/C/79/Add.114, 1 November 1999 (second periodic report).

[3] Tae Hoon Park v Republic of Korea Case No 628/1995, Views adopted on 20 October 1998, and Keun-Tae Kim v Reoublic of Korea Case No 574/1994, Views adopted on 3 November 1998.

[4] E/CN.4/1996/39/Add.1

3.6 The author argues that the Court failed to demonstrate that his conviction was necessary for purposes of national security, as required under article 19, paragraph 2, to justify an infringement of the right to freedom of expression. The Court applied a subjective and emotional test, finding the picture "active and aggressive" in place of the objective standard previously articulated by the Constitutional Court. Without showing any link of the author to the DPRK or any other implication of national security, the Supreme Court justices simply expressed personal feelings as to the effect of the picture upon viewing it. This demarche effectively places the burden of proof on the defendant, to prove himself innocent of the charges.

3.7 By way of remedy, the author seeks (i) a declaration that his conviction and the damage caused to the painting by careless handling violated his right to freedom of expression, (ii) unconditional and immediate return of the painting in its present condition, (iii) a guarantee by the State party of non-violation in the future by repeal or suspension of article 7 of the National Security Law, (iv) re-opening his conviction by a competent court, (v) payment of adequate compensation, (vi) publication of the Committee's Views in the Official Gazette and their transmission to the Supreme Court for distribution to the judiciary.

3.8 The author states that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The State party's submissions on admissibility and merits

4.1 By Note verbale of 21 December 2001, the State party argued that the communication is inadmissible and lacking in merit. As to admissibility, the State party argues that as the judicial proceedings in the author's case were consistent with the Covenant, the case is inadmissible.

4.2 Concerning the merits of the case, the State party contends that the right to freedom of expression is fully guaranteed as long as any expression does not infringe the law, and that the article 19 of the Covenant itself provides for certain restrictions on its exercise. As the painting was lawfully confiscated, there is no ground for either re-trial or compensation. In addition, re-trial is not provided for in national law and any amendment to law to so provide is not feasible. Any claims of a violation of the right to freedom of expression will be considered on the merits in individual cases. As a result, the State party cannot commit itself to a suspension or repeal of article 7 of the National Security Law, although a revision is under discussion.

The author's comments

5.1 Following reminders of 10 October 2002 and 23 May 2003, the author indicated, by communication of 3 August 2003, that as the State party had not provided any substantive reasoning in terms of article 19 of the Covenant to justify his conviction, he did not wish to comment further on the State party's arguments.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol. With respect to the exhaustion of domestic remedies, the Committee notes that the State party has not claimed that there are any domestic remedies that have not been exhausted or could be further pursued by the author. Since the State party is claiming inadmissibility on the generic contention that the judicial proceedings were consistent with the Covenant, issues which are to be considered at the merits stage of the communication, the Committee considers it more appropriate to consider the State party's arguments in this respect at that stage.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee observes that the picture painted by the author plainly falls within the scope of the right of freedom of expression protected by article 19, paragraph 2; it recalls that this provision specifically refers to ideas imparted "in the form of art". Even if the infringement of the author's right to freedom of expression, through confiscation of his painting and his conviction for a criminal offence, was in the application of the law, the Committee observes that the State party must demonstrate the necessity of these measures for one of the purposes enumerated in article 19 (3). As a consequence, any restriction on that right must be justified in terms of article 19 (3), i.e. besides being provided by law it also must be necessary for respect of the right or reputations of others, or for the protection of national security or public order (ordre public) or of public health and morals ("the enumerated purposes").

7.3 The Committee notes that the State party's submissions do not seek to identify which of these purposes are applicable, much less the necessity thereof in the particular case; it may however be noted that the State party's superior courts identified a national security basis as justification for confiscation of the painting and the conviction of the author. As the Committee has consistently found, however, the State party must demonstrate in specific fashion the precise nature of the threat to any of the enumerated purposes caused by the author's conduct, as well as why seizure of the painting and the author's conviction were necessary. In the absence of such justification, a violation of article 19, paragraph 2, will be made out.[5] In the absence of any individualized justification therefore of why the measures taken were necessary in the present case for an enumerated purpose, therefore, the Committee

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[5] See, for example, Tae Hoon Park v Republic of Korea Case No 628/1995, Views adopted on 20 October 1998, at paragraph 10.3, and Keun-Tae Kim v Reoublic of Korea Case No 574/1994, Views adopted on 3 November 1998, at paragraphs 12.4-12.5.

finds a violation of the author's right to freedom of expression through the painting's confiscation and the author's conviction.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation for his conviction, annulment of his conviction, and legal costs. In addition, as the State party has not shown that any infringement on the author's freedom of expression, as expressed through the painting, is justified, it should return the painting to him in its original condition, bearing any necessary expenses incurred thereby. The State party is under an obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]